No. 91-718

IN THE

Supreme Court of the United States

October Term, 1991

LILLIE A. HARRISON

Petitioner

versus

DOW CHEMICAL COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether summary judgment was properly entered against the petitioner based upon the failure of counsel to file an opposition to respondent's motion for summary judgment.

2. Whether a court of appeals may consider evidence not presented to the district court when reviewing the judgment on appeal.

TABLE OF CONTENTS

Page:

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statutes iv

Opinions and Reports 1

Jurisdictional Statement 2

Statutes and Regulations Involved 2

Statement of the Case 2

Argument 4

Conclusion 7

Certificate of Service 8

Appendix A — Opinion of the United States Court of Appeals, Fifth Circuit A-1

Appendix B — Opinion of the United States District Court, Middle District of Louisiana B-1

Appendix C — Magistrate's Report, Middle District of Louisiana C-1

Appendix D — Personal Response from Judge Frank J. Polozola, Middle District of Louisiana D-1

Appendix E — Notice of Appeal, Fifth Circuit filed Pro Se E-1

Appendix F — Letter from Lillie Harrison to Judge Polozola asking for her case to be heard F-1

TABLE OF AUTHORITIES

Cases: **Pages:**

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S.Ct. 2548 (1986) 4

Garcia v. American Marine Corp.,
432 F.2d 6 (5th Cir. 1970) 3

Hibernia Nat. Bank v. Admin. Cen. Soc. Anonima,
776 F.2d 1277 (5th Cir. 1985) 4

In re AOV Industries, Inc. et al,
797 F.2d 1004 (D.C. Cir. 1986) 6

McCrae v. Hankins,
720 F.2d 863 (5th Cir. 1983) 4

McKinney v. Dole,
765 F.2d 1129 (D.C. Cir. 1985) 4

Munoz v. Int'l. Alliance of Theatrical Stage Employees,
563 F.2d 205 (5th Cir. 1977) 3

Powell v. U.S. Bureau of Prisons,
927 F.2d 1239 (D.C. Cir. 1991) 6

Proctor v. State Farm Mutual Automobile Ins. Co.,
675 F.2d 308 (D.C. Cir.) cert. denied,
459 U.S. 839, 103 S.Ct. 86 (1986) 6

Singleton v. Wulff,
428 U.S. 106, 96 S.Ct. 2868 (1976) 6

Tirado v. Bowen,
842 F.2d 595 (2nd Cir. 1988) 6

U.S. of Am. v. Bailey, et al,
585 F.2d 1087 (D.C. Cir.) rehearing denied (1978) 6

TABLE OF AUTHORITIES (Continued)

Statutory Provisions **Pages:**

42 U.S.C. § 2000, et seq. 2
28 U.S.C. § 1254(1) 2

Rules:

Fed. R. Civ. P. 56 2

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LILLIE A. HARRISON

Petitioner

versus

DOW CHEMICAL COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS AND REPORTS

The opinion of the Court of Appeals for the Fifth Circuit has not been reported and is reprinted in the Appendix hereto. The Magistrate's reports and opinions ("order") of the U.S. District Court have not been reported and are also reprinted in the Appendix hereto.

JURISDICTIONAL STATEMENT

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on August 1, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq.

Summary Judgment, Federal Rules of Civil Procedure 56.

STATEMENT OF THE CASE

Petitioner, Lillie A. Harrison, instituted this suit on September 21, 1989, through her attorney, Robert F. Monahan, against the respondent, Dow Chemical Company (hereinafter referred to as Dow), based on race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e), et seq. Subsequent to filing its answer on October 17, 1989, and its amended answer on August 10, 1990, Dow, on August 22, 1990, filed a Motion for Partial Summary Judgment to dismiss Ms. Harrison's pendent state claim and her claim for compensatory damages. This motion was unopposed by Ms. Harrison's attorney. Dow then moved for summary judgment on Ms. Harrison's Title VII claim as well. Although Ms. Harrison's attorney filed for and received an extension of time to file an opposition to Dow's motion, he nevertheless allowed the motion to proceed unopposed.

On October 16, 1990, Magistrate Stephen C. Riedlinger recommended the granting of Dow's motion for partial summary judgment which was adopted by United States District Court Judge Frank Polozola on November 21, 1990. Subsequently, on Novem-

ber 30, 1990, Magistrate Riedlinger granted Dow's motion for summary judgment which again was adopted by Judge Polozola on January 8, 1991, dismissing Ms. Harrison's suit with prejudice.

Upon Ms. Harrison learning that both of Dow's motions were unopposed, she sent a letter to Judge Polozola which was received by the court on January 16, 1991 (Appendix F), requesting that the case be "reopened" based upon the need to have her evidence in opposition considered. Since the court did not respond to Ms. Harrison's letter, a notice of appeal to the Fifth Circuit Court of Appeals from the judgment of the Middle District of Louisiana was filed pro se (Appendix E). Subsequent to filing the notice of appeal, Ms. Harrison received a letter from Judge Polozola on February 14, 1991, explaining that because she had filed a notice of appeal, his court no longer had jurisdiction in the case (Appendix D).

On appeal, Ms. Harrison's new attorney sought to have the case remanded based upon the introduction of the evidence not presented to the trial court for consideration in opposition to Dow's motions for summary judgment. The evidence presented to the Court of Appeals sought to prove that not only were genuine issues of material facts present in the case, but that injustice would otherwise result if the judgment was entered based on Dow's motions being unopposed. However, on August 1, 1991, the United States Court of Appeals affirmed the decision of the Middle District of Louisiana citing two Fifth Circuit cases, *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (1970) and *Munoz v. Int'l. Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (1977). The court stated that it could not consider any of her evidence brought to light for the first time on appeal, *Garcia*, supra, and that the materials not presented to the district court to oppose summary judgment are *never* properly before the reviewing court on appeal, *Munoz*, supra, (emphasis added).

ARGUMENT

Summary judgment is only proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See *McCrae v. Hankins*, 720 F.2d 863, 865 (5th Cir. 1983). This Court, in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), further explained Fed. R. Civ. P. 56 in that a party defending against a motion for summary judgment must establish the existence of elements essential to his case which he has the burden to prove at trial. If there is "a complete failure of proof concerning an essential element of the nonmoving party's case," then summary judgment is entitled to the moving party as a matter of law. *Celotex* at 322, 323. Although it is risky for a nonmoving party to fail to present evidence in response to the moving party's motion, failure to do so does not automatically mandate granting a motion for summary judgment. *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985). Therefore, a motion for summary judgment cannot be granted simply because there is no opposition filed to the motion. *Hibernia National Bank v. Administrative Cent. Soc. Anonima*, 776 F.2d 1277 (5th Cir. 1985). Furthermore, if granting the Motion for Summary Judgment was therefore based on thhe failure to respond to the motion, then reversible error was committed. *Hibernia Nat'l. Bank*, Id.

In the case at bar, the magistrate states six times in his two reports that the petitioner failed to come forward with any evidence to show that there was a genuine issue of material fact, besides outlining in the first paragraph of each report that the respondent's motion was unopposed. Also, the opinion adopting the Magistrate's report by the United States District Judge begins by stating that no objection was filed. However, if the Magistrate, or the

Judge, had examined the depositions and exhibits that were part of the record for the petitioner, then the respondent's motion could have been defeated. Therefore, just because the motion was unopposed, at no fault of the petitioner, it does not mean that there was *a complete failure of proof* concerning essential elements of the petitioner's case (emphasis added).

Upon the petitioner becoming aware that the respondent's motions were unopposed, she wrote a letter to the Federal District Court Judge. Although the language of the letter was in layman's terms, it is clear that she sought a rehearing so as to present her evidence in opposition. Such a request was also timely. However, the District Court did not act on her request and for fear of not being able to timely request an appeal, she did so pro se. Then, after giving notice that an appeal would be filed, the District Court responded to her letter by stating that since she had given notice of appeal, the District Court no longer had jurisdiction in her case.

In the petitioner's appeal to the United States Court of Appeals for the Fifth Circuit, the new attorney for petitioner sought to have the case remanded based on the evidence which was in the record but presented for the first time in the Court of Appeals. In its opinion, the Court of Appeals stated it could not "consider any of her evidence brought to light for the first time on appeal," *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (5th Cir. 1970), and that "materials not presented to the district court for consideration of a motion for summary judgment *are never properly before the reviewing court on appeal,*" quoting *Munoz v. Int'l. Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir. 1977) (emphasis added).

Although it is not the job of the Court of Appeals to examine evidence presented for the first time to find issues of fact, the court should remand the case to the district court to conduct further

hearings to include the evidence. See *Tirado v. Bowen*, 842 F.2d 595 (2nd Cir. 1988). *In re AOV Industries, Inc. et al*, 797 F.2d 1004 (D.C. Cir. 1986). Further, this Court has left the decision to the discretion of the Court of Appeals to make exceptions for such evidence when injustice might otherwise result." *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239 (D.C. Cir. 1991). *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877 (1976). See *Proctor v. State Farm Mutual Automobile Ins. Co.*, 675 F.2d 308, 326 (D.C. Cir.) cert. denied, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed. 2d 81 (1982), see also *U.S. of America v. Bailey, et al*, 585 F.2d 1087 (D.C. Cir.) rehearing denied (1978). By taking these authorities into consideration, it is clear that the Fifth Circuit is in conflict with the decisions of this Court and courts of other districts.

CONCLUSION

The petitioner submits to this Court that had the District Court acted upon petitioner's letter and granted a rehearing, injustice would not have resulted and this Court would not be called upon to decide these issues. However, this was not the case. This suit is based on race discrimination. Certainly this is a matter with far reaching consequences in which the outcome may affect countless others, not this petitioner alone. Not only would a grave injustice be done to this petitioner by the harsh application of the rule in the Fifth Circuit, in that it never considers evidence presented for the first time in its court, but, injustice will also be done to those who come after her. Therefore, for all the foregoing reasons, the petitioner prays that this Court grant this Petition for Writ of Certiorari, and further, to remand this case for a full hearing which includes all the evidence in the record to prevent injustice.

Respectfully submitted,

Dan M. Scheuermann
Counsel for Petitioner
405 St. Ferdinand St.
Baton Rouge, LA 70802
Telephone: (504) 387-1221

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to a counsel of record by placing three copies in the United States mail, properly addressed, postage prepaid this 29th day of October, 1991, Baton Rouge, Louisiana.

Dan M. Scheuermann

APPENDICES

APPENDIX A

In the United States Court of Appeals
For the Fifth Circuit

No. 91-3126
Summary Calendar

LILLIE A. HARRISON **Plaintiff-Appellant,**

versus

DOW CHEMICAL COMPANY **Defendant-Appellee.**

Appeal from the United States District Court for the
Middle District of Louisiana
(CA-89-711-B-MI)
(August 1, 1991)

Before CLARK, Chief Judge, KING and GARWOOD, Circuit Judges.

PER CURIAM:*

Lillie Harrison filed a Title VII action against her employer, Dow Chemical Company (Dow), also alleging a pendent state claim for intentional infliction of emotional distress. The district court granted Dow's initial motion for partial summary judgment, and its later motion for summary judgment on the entire case.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Harrison filed no opposition. On appeal, Harrison argues that her counsel's ineffective assistance caused her action to be dismissed. She presents an exhibit book she believes to establish facts that are material and at issue. Harrison concedes that her attorney failed to file any evidence with the district court in opposition to Dow's summary judgment motions, and that none of the evidence recounted in her appellate brief was presented to the district court. We cannot consider any of her evidence brought to light for the first time on appeal. *Garcia v. American Marine Corp.*, 432 F.2d 6, 8 (5th Cir. 1970). "Materials not presented to the district court for consideration of a motion for summary judgment are never properly before the reviewing court on appeal from the judgment granting the motion." *Munoz v. Int'l. Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir. 1977).

That her counsel might have been deficient provides no ground for relief, for civil litigants have no sixth amendment right to effective assistance of counsel. *Sanchez v. United States Postal Service*, 785 F.2d 1236, 1237 (5th Cir. 1986). If her attorney did mishandle this matter, Harrison may have a remedy against her attorney in the form of a malpractice action. *Id.* That action would remain distinct from the matters before the district court and this court. Harrison's concessions establish that summary judgment was properly entered. She is entitled to no relief in this proceeding. *Id.*

AFFIRMED. *See* Local Rule 47.6.

APPENDIX B

United States District Court
Middle District of Louisiana

Civil Action
No. 89-711-B

LILLIE A. HARRISON
versus
DOW CHEMICAL COMPANY

AMENDED OPINION

For reasons set forth in the Magistrate's Report to which *no* objection was filed:

IT IS ORDERED that Dow Chemical Corporation's motion for summary judgment be GRANTED and this suit be dismissed. Judgment shall be entered accordingly.

Baton Rouge, Louisiana, January 7, 1991.

/s/ Judge Frank J. Polozola
United States District Judge

APPENDIX C

United States District Court
Middle District of Louisiana

Civil Action
No. 89-711-B

LILLIE A. HARRISON
versus
DOW CHEMICAL COMPANY

MAGISTRATE'S REPORT

This matter is before the court on a motion for partial summary judgment and to dismiss plaintiff's pendent state law claim and claim for compensatory damages. The motion is unopposed.

Plaintiff, Lillie A. Harrison, hired by the defendant, Dow Chemical Company (Dow) in 1971, filed this action pursuant to Title VII alleging that she was denied promotions and received smaller merit increases because of her race, black. Plaintiff also asserted a pendent state law claim for intentional infliction of mental distress, in addition to equitable relief and attorney's fees, requested compensatory damages. Defendant's contention in its motion for partial summary judgment was essentially that there was no basis in law for the plaintiff's alleged cause of action under state law or her claim for compensatory damages. Defendant based

the motion to dismiss the state law cause of action and claim for damages on two grounds: (1) prescription, and (2) failure to state a claim upon which relief can be granted.

Summary judgment is only proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ. P. 56(c). The party seeking summary judgment always bears the initial responsibility of identifying for the court those portions of the record, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 242, 106 S.Ct. 2548, 2553 (1986). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex, supra*. With regard to materiality, only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment.

Prescription

Defendant argued that the plaintiff's claim under Louisiana Civil Code Article 2315 for intentional infliction of emotional distress was prescribed under Louisiana Civil Code Article 3492.[1] Article 3492 provides that delictual actions are subject to a liberative prescription of one year which commences from the day injury or damage is sustained.[2] The allegations of the plaintiff's complaint and her deposition testimony indicated that the plaintiff was aware of the facts giving rise to her complaint at the time of job performance reviews in 1987 and March of 1988. Plaintiff's depo.

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[1] Defendant attached to its motion plaintiff's response to interrogatory number 3 in which plaintiff stated that her alleged state law claim was for intentional infliction of emotional distress under Louisiana Civil Code Article 2315.

[2] See, *Clofer v. Celotex Corp.*, 528 So.2d 1074 (La. App. 5th 1988); *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989).

p. 196. Furthermore, the plaintiff filed her EEOC charge July 14, 1988. Plaintiff's depo. p. 201. Accepting July 14, 1988 as the latest date when prescription began to run, the plaintiff's claim would have been over a year old at the time she filed suit on September 21, 1989. Moreover, the plaintiff failed to designate any facts in the record to show that there is a genuine issue of material fact as to whether or not her state law cause of action has prescribed.

Plaintiff also alleged in her complaint that from December, 1986 to the present she has received smaller merit percentage pay increases than white secretarial employees. In the case of a continuous violation, state law recognizes an equitable exception to the one year prescriptive period. Where the cause of injury is a continuous one giving rise to successive damages, prescription dates from the cessation of the wrongful conduct causing the damage. *See, South Central Bell Telephone v. Texaco, Inc.*, 418 So.2d 531, 533 (La. 1982); *Waltman, supra*. However, this is a motion for summary judgment and the plaintiff again failed to come forward with any evidence to support her allegation of continuing discrimination in pay increases. Thus, the record does not support any continuing tort based on intentional infliction of emotional distress due to discrimination in pay, and the plaintiff has failed to demonstrate that there exists a genuine issue for trial regarding the existence of a continuing violation.

Failure to State a Claim

Even assuming that the plaintiff's claim has not prescribed, under Louisiana law the plaintiff has failed to allege or support a claim for intentional infliction of emotional distress. Such a claim requires allegations that the defendant acted intentionally, to embarrass and humiliate the plaintiff in a manner which was outrageous and beyond the privileged bounds of insisting on one's legal rights. *Steadman v. South Central Bell Telephone Co.*, 362 So.2d 1144, 1146 (La.App. 2d Cir. 1978); *Marshall v. Circle K Corp.*, 715 F.Supp. 1341 (M.D. La. 1989). Plaintiff did not allege in her complaint facts or circumstances from which it could be

inferred that the defendant acted in an outrageous or extreme manner. The complaint did not include any facts that would give rise to such an action in tort, and the plaintiff's deposition testimony also did not reveal any facts that would suggest or support a claim of intentional infliction of emotional distress. Plaintiff's depo. pp. 196, 201, 209-10.

In summary, defendant has demonstrated the absence of any genuine issue of material fact on these issues and the plaintiff has failed under the requirement of Rule 56(e) to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. Accordingly, summary judgment should be granted as to the plaintiff's state law claim for intentional infliction of emotional distress.

Claim for Compensatory Damages

Plaintiff requested compensatory damages in her complaint. The court has determined that summary judgment should be granted as to the plaintiff's alleged state law tort claim. If the district court adopts this recommendation then only plaintiff's Title VII claim remains, therefore the plaintiff's request for compensatory damages should also be dismissed. It is well established that under Title VII only equitable relief is available. *Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988); *Hampton v. I.R.S.*, 1990 U.S. App. Lexis 16960 (5th Cir. 1990).

RECOMMENDATION

It is the recommendation of the magistrate that the defendant's motion for partial summary judgment be granted dismissing the plaintiff's pendent state claim and claim for compensatory damages.

Baton Rouge, Louisiana, October 15, 1990.

/s/Stephen O. Riedlinger
United States Magistrate

APPENDIX D

United States District Court
Middle District of Louisiana
Baton Rouge, La. 70801

Chambers of
Frank J. Polozola
Judge

February 14, 1991

Ms. Lillie A. Harrison
3471 Lukeville Lane
Brusly, Louisiana 70719

Re: Lillie A. Harrison
v. Dow Chemical Co.
Civil Action 89-711-B

Dear Ms. Harrison:

Because you have taken an appeal, the Court no longer has jurisdiction in this case.

/s/Frank J. Polozola
United States District Judge

APPENDIX E

United States District Court for the
Middle District of Louisiana

Civil Action No. 89-711-B
Notice of Appeal

LILLIE A. HARRISON
versus
DOW CHEMICAL COMPANY

Notice of Appeal to the
Fifth Circuit Court of Appeals
from the Judgment of the Middle District of Louisiana

Notice is hereby given that LILLIE A. HARRISON, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 3rd day of January, 1991.

RESPECTFULLY SUBMITTED,

/s/Lillie A. Harrison
In Proper Person
3471 Lukeville Street
Brusly, Louisiana 70719

APPENDIX F

January 14, 1991

Judge Frank J. Polozola
United States District Court
Middle District of Louisiana
113 U.S. Court House
707 Florida Blvd.
Baton Rouge, LA 70801

RE: LILLIE A. HARRISON VS.
DOW CHEMICAL COMPANY
CIVIL ACTION NO. 89-711-B

Dear Sir:

This letter comes as a request to have the above mentioned case re-opened on the following basis:

1. The plaintiff attorney of record, Mr. Robert Felton Monahan failed to file several crucial documents in connection with this case. These documents are listed below:
   a. Opposition to the Defendant's Motion for Summary Judgement after he asked the court for a five day extension to file the objection or opposition.
   b. Objection to Magistrate Stephen Riedlinger's Report dated October 15, 1990.
   c. Objections to Judge Frank Polozola's Opinion dated November 21, 1990.

I sincerely believe that the filing of these documents were relevant to the Judgement rendered in this case.

2. The plaintiff attorney of record, Mr. Robert Felton Monahan was unavailable for meetings scheduled by his office with the plaintiff on the following dates.

   a. January 2, 1991 at 4:30 p.m., Mr. Monahan's secretary said he was out of town and would not return until Friday, January 4, 1991. On the day of his return I tried contacting him by phone and once again he was unavailable.

   b. January 8, 1991 at 4:30 p.m., Mr. Monahan's secretary called to cancel the scheduled appointment because he was supposedly out of town and/or unavailable to meet.

   c. January 11, 1991 at 4:30 p.m. Mr. Monahan was once again out of town and could not be reached for verbal conversation with me. However, upon my arrival to his office the secretary presented me with an envelope containing several documents. One of those documents was an unsigned letter of resignation. (Attachment 1). This was the very first time feelings were expressed that I did not have a viable Title 7 cause of action. This letter was given to me three days prior to the scheduled trial dates of January 14-15, 1991, and eight days after the Judgment was rendered by the Judge on January 3, 1991. Because of this drastically late correspondence, I only have 21 days to file an appeal to the Judgment rendered and not the normal 30 days established by law.

In my opinion, and I hope you agree that this was a very unethical, unprofessional and rude manner in which Mr. Monahan handled this case. As a result, I have requested that Mr. Robert Felton Monahan file a motion with the court to withdraw from this case so that I may be afforded the opportunity to seek a new counselor to re-open the case at the court's permission to develop it in the manner that it should have been done in the first place. (Attachment 2).

Judge Polozola, as you can plainly see, I am at the mercy of the court. I humbly ask you to give me the opportunity to have my case heard and my day in court.

Humbly submitted,

Lillie A. Harrison
3471 Lukeville Lane
Brusly, LA 70719

Attachments (2)